Before the R
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

MAR 1 2 1999

In the Matter of

Implementation of the Pay
Telephone reclassification and
Compensation provisions of the
Telecommunications act of 1996

)

OPPOSITION OF THE TELECOMMUNICATIONS RESELLERS ASSOCIATION

The Telecommunications Resellers Association ("TRA"),¹ through undersigned counsel and pursuant to Rule 1.45 of the Commission's Rules, 47 C.F. R. § 1.45, hereby opposes the Petition for Clarification ("Petition") filed by the RBOC/GTE/SNET Payphone Coalition ("RBOC/GTE/SNET") in the subject docket on February 26, 1999. Although they disingenuously style their Petition as a request for clarification, RBOC/GTE/SNET in reality seek reconsideration of a decision issued by the Commission in this docket more than two years ago. If a rule change such as that advocated by RBOC/GTE/SNET is to be effected, it must be accomplished through notice and comment rulemaking. TRA strongly urges the Commission to decline the

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A national trade association, TRA represents more than 800 entities engaged in, or providing products and services in support of, telecommunications resale. TRA was created, and carries a continuing mandate, to foster and promote telecommunications resale, to support the telecommunications resale industry and to protect and further the interests of entities engaged in the resale of telecommunications services. TRA is the largest association of competitive carriers in the United States, numbering among its members not only the large majority of providers of domestic interexchange and international services, but the majority of competitive local exchange carriers, as well.

RBOC/GTE/SNET invitation to commit reversal procedural error and summarily deny the RBOC/GTE/SNET Petition.

In its *Report and Order* in the subject docket, the Commission concluded that "in the interests of administrative efficiency and lower costs, facilities-based carriers should pay the per-call compensation for the calls received by their reseller customers." The Commission reasoned that "[b]ecause they do not have their own networks, it would be significantly more burdensome for resellers to track calls from payphones." In addressing this issue in its *Order on Reconsideration*, the Commission reaffirmed its belief that the universe of interexchange carriers ("IXCs") upon whom the burden of tracking calls originated by, and paying compensation to, payphone service providers ("PSPs") should be limited. The Commission, however, clarified that for purposes of payphone compensation the universe of facilities-based carriers would include all carriers that

Implementation of the Pay Telephone Reclassification and Compensation Provisions of the Telecommunications Act of 1996, Report and Order, 11 FCC Rcd. 20541, ¶ 86, Order on Reconsideration, 11 FCC Rcd. 21233 (1996), vacated in part sub nom. Illinois Public Telecommunications Ass'n v. FCC, 117 F.3d 555, 560, clarified on rehearing 123 F.3d 693 (D.C. Cir. 1997), Second Report and Order, 13 FCC Rcd 1778 (1997), remanded in part MCI Telecommunications Corp. v. FCC, 143 F3d 606 (D.C. Cir. 1998), Third Report and Order and Order on Reconsideration of the Second Report and Order, FCC 99-7 (released Feb. 4, 1999).

³ <u>Id</u>.

Implementation of the Pay Telephone Reclassification and Compensation Provisions of the Telecommunications Act of 1996, Order on Reconsideration, 11 FCC Rcd. 21233, ¶ 92 (1996), vacated in part sub nom. Illinois Public Telecommunications Ass'n v. FCC, 117 F.3d 555, 560, clarified on rehearing 123 F.3d 693 (D.C. Cir. 1997), Second Report and Order, 13 FCC Rcd 1778 (1997), remanded in part MCI Telecommunications Corp. v. FCC, 143 F3d 606 (D.C. Cir. 1998), Third Report and Order and Order on Reconsideration of the Second Report and Order, FCC 99-7 (released Feb. 4, 1999).

"maintained . . . [their] own switching capability, regardless if the switching capability is owned or leased.5"

Now more than two years later, ⁶ RBOC/GTE/SNET urge the Commission to "clarify" that the universe of IXCs upon which call tracking and direct payment compensation obligations are imposed includes "the entit[ies] identified by the Carrier Identification Code ("CIC") used to route the compensable call from the Local Exchange Carrier network." RBOC/GTE/SNET suggest that in so doing, the Commission would merely be reinterpreting its existing rules and thus need not engage in "full rulemaking." This view differs sharply from than espoused by RBOC/GTE/SNET when it first offered its "'CIC' solution." At that time, RBOC/GTE/SNET characterized its proposal as a "suggested revision" to the existing rules.¹⁰

The RBOC/GTE/SNET's first assessment is, of course, correct. The so-called "'CIC' solution" would greatly expand the universe of IXCs subject to call tracking and direct payment compensation obligations, in direct contravention of previously announced Commission policies. Many smaller IXCs have and use CICs without owning or leasing switching equipment.

⁵ Id.

In the interim, the matter of which IXCs must track payphone-originated calls and compensate PSPs directly has not been placed at issue by the Commission. Indeed, other than with respect to the interim compensation period, this matter was not appealed.

⁷ Petition at 2.

⁸ <u>Id</u>. at 2, fn. 2.

Letter from Michael K. Kellogg, counsel to the RBOC/GTE/SNET Payphone Coalition, to Lawrence Strickling, Chief, Common Carrier Bureau, Federal Communications Commission, dated November 17, 1998, at page 6.

¹⁰ Id. at 6.

These carriers' CICs are merely loaded into the switches of their underlying facilities-based carriers. The "reinterpretation" advocated by RBOC/GTE/SNET, therefore, would impose new duties and obligations on the very carriers the Commission exempted from call tracking and direct payment obligations because of the significantly greater burden these duties and obligations would represent for such carriers. And it would do so without affording the affected carriers the opportunity for notice and comment required by law.

It is well settled that an agency may not constructively rewrite a rule by reinterpreting it. Sanctioning such conduct would "render the requirements of [Section] 553 basically superfluous in legislative rulemaking by permitting agencies to alter their requirements for affected public members at will through the ingenious device of 'reinterpreting' their own rule. "13 "[T]he procedural guarantees of notice and comment . . . would not be meaningful if an agency could effectively, constructively amend regulations by means of nonobvious readings without giving the affected parties an opportunity either to affect the content of the regulations at issue or at least to be aware of the scope of their demands." 14

See, e.g., Attachment A.

National Family Planning and Reproductive Health Association, Inc. et al. v Sullivan, 979 F.2d 227, 231 (D.C. Cir., 1992) ("When an agency promulgates a legislative regulation by notice and comment directly affecting the conduct of . . . members of the public and, on challenge, to the . . . Court, it may not subsequently repudiate that announced meaning and substitute for it a totally different meaning without proceeding through the notice and comment rulemaking normally required for amendments of a rule.")

¹³ Id.

Secretary of Labor v. Western Fuels-Utah, Inc., 900 F.2d 318, 327 (D.C. Cir., 1990).

Accordingly, the Commission should summarily dismiss the RBOC/GTE/SNET Petition as an untimely filed petition for reconsideration. Alternatively, the Commission should treat the RBOC/GTE/SNET Petition as a petition for rulemaking, providing affected parties with the notice and the opportunity for comment necessary to protect their rights. If, however, the Commission considers the Petition on it merits, it should deny it for sound and compelling public policy reasons.

Section 257 of the Communications Act of 1934, as amended by the Telecommunications Act of 1996, 47 U.S.C. § 257, requires the Commission to identify and eliminate barriers to participation by entrepreneurs and small business in the telecommunications industry. In carrying out the mandate of Section 257, the Commission has "acted to identify and eliminate market entry barriers for small businesses, to remove or reduce impediments, and to increase opportunities for small business participation in the telecommunications market."

Consistent with this approach, the Commission, in adopting its payphone compensation mechanism, was careful to minimize the regulatory burdens and other adverse impacts on small entities, by among other things, "requir[ing]... facilities-based carriers... to pay the per-call compensation for calls received by their reseller customers."

As a result, the Commission was able to report that the mechanism it adopted "minimize[d]... the impact of our decisions for... small entities."

Section 257 Proceeding to Identify and Eliminate Market Entry Barriers for Small Businesses, 12 FCC Rcd. 16802, ¶ 2 (1997).

Implementation of the Pay Telephone Reclassification and Compensation Provisions of the Telecommunications Act of 1996, Report and Order, 11 FCC Rcd. 20541 at ¶ 342; Second Report and Order, 13 FCC Rcd 1778 at ¶ 163.

¹⁷ Id.

RBOC/GTE/SNET would have the Commission reverse these policies and burden smaller IXCs with the very call tracking and direct payment obligations the Commission previously recognized would be highly detrimental to small carriers. While RBOC/GTE/SNET disingenuously claim that the rule revision they seek would not cause any hardship, ¹⁸ the Commission correctly concluded in relieving non-facilities-based carriers of call tracking and direct payment obligations that it would be "significantly more burdensome for resellers to track calls from payphones." As RBOC/GTE/SNET appear to recognize, switches provide the means for call tracking, rendering such activity impossible for a "switchless" reseller to undertake. And while RBOC/GTE/SNET are correct that small "switchless" resellers could contract with their network service providers for the performance of this function, such service would come at no small cost. And then, that same small "switchless" reseller would need to expend further back-office resources in effecting payments to the thousands of PSPs across the nation.

The Commission has previously rejected proposals to expand the universe of carriers required to track calls and directly compensate PSPs to include all IXCs.²⁰ In so doing, it has appropriately reemphasized its concern regarding the adverse impacts such obligations would have on smaller carriers. Those concerns remain no less valid today than they did when first articulated by the Commission. In fact, given the damage that the continuing waivers of the Commission's

Letter from Michael K. Kellog, counsel to the RBOC/GTE/SNET Payphone Coalition, to Lawrence Strickling, Chief, Common Carrier Bureau, Federal Communications Commission, dated November 17, 1998, at page 6

Implementation of the Pay Telephone Reclassification and Compensation Provisions of the Telecommunications Act of 1996, Order on Reconsideration, 11 FCC Rcd. 21233 at ¶ 86.

Id. at ¶¶ 82, 92.

designation of the provision of payphone-specific coding digits as a prerequisite to payphone compensation obligations²¹ have inflicted on smaller IXCs, particularly those providing debit card service, the concerns are now even more serious.

By reason of the foregoing, the Telecommunications Resellers Association strongly urges the Commission to deny as procedurally defective, or, in the alternative, as unsound from a public policy perspective, the RBOC/GTE/SNET Petition.

Respectfully submitted,

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March 12, 1999

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See, e.g., <u>Implementation of the Pay Telephone Reclassification and Compensation Provisions of the Telecommunications Act of 1996</u>, Memorandum Opinion and Order, 13 FCC Rcd. 4998 (1998).

ATTACHMENT A

Carrier Network Services

How far is your reach?

MCI's Carrier Network Services represents a robust suite of services, specifically designed to meet the unique network needs of Switchless Resellers. Carrier Network Services brings you the control that you need: simply, transparently and with positive impact on your bottom line. Whether you are looking for switched or dedicated outbound services, inbound services, calling cards or Operator Services, MCI can put together a package to expand your market and addressable revenue. At the same time, your minute volume will drive your rates lower across all products.

The Back-Office Support You Need...

Already known for facilities-based services, MCI offers superior back office operations dedicated for switchless carriers. We offer you advanced tools to facilitate your business management. But most of all, MCI offers you the use of its state-of-the-art network.



(more)

The Control You Desire...

MCI will assist you in obtaining your own, unique CIC through LEC/Bellcore. With a solid track record behind us, you can relax while we write each ASR, report on LECs' progress with CIC loading, and manage the overall sub-CIC routing process.



Having your own CIC means you have ownership and control of your customer base. That means you reconcile "LEC Reject" orders, and can make sure that they're done right. That means one-on-one contact with the issues. Plus, you'll receive customized branding on each one of the Carrier Network Services you offer. That puts you in the driver's seat, with MCI available to help every mile down the road. And, if you plan to purchase switches in the future to become hybrid carrier, having your own CIC will facilitate your transition into the facilities-based market.

Carrier Network Services

The Unfailing Accuracy You Demand...



When you combine the security of MCI's centralized facilities used to manage the Order entry process, with the automation of our back office support, you will be confident with the accuracy and speed of the provisioning process. Our order entry system's architecture has the flexibility to adapt to a customer's changing environment and can easily respond to your unique needs. And, our extensive portfolio of services provides you with one-stop shopping for all of your Switchless product needs.



Carrier Network Services

For questions on MCI's Switchless Program, please contact:

Carrier Product Management at (404) 673-1222



CERTIFICATE OF SERVICE

I, Evelyn Correa, do hereby certify that a true a correct copy of the foregoing document has been served by the United States First Class Mail, postage prepaid, individuals listed, the 12th day of March 1999.

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